OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

May 8, 2002

Ms. Janet Little Horton
Bracewell & Patterson
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2002-2435

Dear Ms. Horton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162590.

The Humble Independent School District (the "district"), which you represent, received a written request for "the complete investigation, including notes, recordings, reports, letters, and any other materials germaine [sic] to said investigation against [a named district employee] involving [a named district student]." In this instance, the requestor is an attorney for the named district student and her family. You have submitted to this office as responsive to the request two sets of documents: an investigation report prepared for the district by an outside attorney (the "Hightower Report"), and the notes created by the attorney for his own use during the course of the investigation (the "Hightower Notes"). You contend the Hightower Report is excepted from required public disclosure pursuant to sections 552.026, 552.101, 552.103, and 552.107 of the Government Code, as well as Rule 503 of the Texas Rules of Evidence and Rule 1.05(a) of the Texas Disciplinary Rules of Professional Conduct. You further contend that the Hightower Notes are excepted from public disclosure pursuant to sections 552.026, 552.101, and 552.107 of the Government Code, as well as Rule 192.5 of the Texas Rules of Civil Procedure and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.

We note at the outset that the Public Information Act expressly incorporates the provisions of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA"). Gov't Code § 552.026. FERPA gives parents the right to inspect the education records of their children. 20 U.S.C. § 1232g(a)(1)(A). Under FERPA, "education records" are those records, files, documents, and other materials which

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). We believe that some of the information at issue consists of "education records" for purposes of FERPA. *See* Open Records Decision No. 462 (1987) at 15.

You contend, however, that the requested records come within the attorney-client and attorney work product privileges. The Family Policy Compliance Office of the United States Department of Education has informed this office that a parent's right to information about his child under FERPA does not prevail over a school district's right to assert the attorney-client and work product privileges.[1] We will, therefore, consider your claims regarding these privileges.

We next discuss the extent to which the Hightower Report is subject to public disclosure. We note at the outset that the Hightower Report consists of a "completed report" that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The Hightower Report therefore must be released pursuant to section 552.022(a)(1) unless the report is expressly made confidential under other law. Sections 552.103 and 552.107(1) of the Government Code are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)); 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential).

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the Hightower Report is confidential under Rule 503.

Rule 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the layer and the lawyer's representative;

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[1] We have enclosed a copy of our correspondence from the Family Policy Compliance Office.

> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
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> (D) between representatives of the client or between the client and a representative of the client; or
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> (E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). In this instance, you have demonstrated all three factors necessary required under Rule 503. Accordingly, we conclude that the district may withhold the Hightower Report in its entirety pursuant to Rule 503 of the Texas Rules of Evidence.[2]

We now address the extent to which the Hightower Notes are excepted from public disclosure. Although you specifically contend that the Hightower Notes constitute "attorney work product" that is excepted from public disclosure under sections 552.101 and 552.107(1), this type of information is more properly protected under section 552.111 of the Government Code. *See* Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). Section 552.111 of the Government Code excepts from required public disclosure:

> An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

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[2] Because we resolve this aspect of your request under Rule 503, we need not address the applicability of the other exceptions you raised for this document.

This office has stated that to withhold attorney work product under section 552.111, a governmental body must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.*

When showing that the requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue. *See id.* at 5. In this regard, you have informed this office that the following events occurred prior to the creation of the Hightower Notes:

> 1) the employee who is the subject of the investigation became subject to criminal prosecution for assault by contact as the result of complaints filed against the employee by a district student;
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> 2) a parent of the student later threatened to pursue both criminal and civil litigation "as far as he could take it"; and
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> 3) the district subsequently hired an attorney to conduct the investigation "to obtain legal analysis, opinion and advice . . . regarding the legal liabilities of the District, if any for the allegations underlying the [criminal] citation."

Based on the above representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. Furthermore, having reviewed the information at issue, we conclude that the information reveals attorney mental impressions, conclusions, and strategy. We therefore conclude that the district may withhold the Hightower Notes in their entirety as attorney work product under section 552.111 of the Government Code.[3]

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

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[3] Because we resolve this aspect of your request under the work product aspect of section 552.111, we need not address the applicability of the other exceptions you raised for this information.

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/sdk

Ref: ID# 162590

Enc: Submitted documents

c: Ms. Jan Rich
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(w/o enclosures)